

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

**IN RE:**

**TRINSIC, INC., et al.,**

**Debtors.**

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**MICHAEL C. REIBLING, Trustee of the  
Estate of Trinsic, Inc., Trinsic  
Communications, Inc., Touch 1  
Communications, Inc., Z-Tel Network  
Services, Inc., and Z-Tel Consumer, LLC.,**

**Plaintiffs,**

**v.**

**THERMO CREDIT, LLC**

**Defendant.**

) **Bankruptcy Case No. 0710324**

) **Adversary Case No. 07-1089**

) **CIVIL ACTION NO. 08-00120-CG-B**

**ORDER**

This matter is before the court on the motion of Thermo Credit, LLC (“Thermo”) to withdraw reference of the case pursuant to 28 U.S.C. § 157(d) and FED. R. CIV. P. 501(a) (Doc. 9)<sup>1</sup>, the objection thereto of Michael Reibling, Trustee of the Estate of Trinsic, Inc., Trinsic Communications, Inc., Touch 1 Communications, Inc., Z-Tel Network Services, Inc., and Z-Tel Consumer Services, LLC (“the Trustee”) (Doc. 19), and the Report and Recommendation of the Bankruptcy Court for the Southern District of Alabama (Docs. 19, 20). No objections were filed

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<sup>1</sup> Within this Order, the court cites to all documents by using the bankruptcy court’s adversary docket numbers. All of the relevant documents were consolidated into one docket entry in this court and can be found in Doc. 1 of this civil case.

to the bankruptcy court's Report and Recommendation. The court agrees with the findings and conclusions of the bankruptcy court and therefore **ADOPTS** the bankruptcy court's Report and Recommendation and **GRANTS** the motion to withdraw reference of this case as to all claims, except the accounting claims in Counts 9 and 10, but will delay the withdrawal until the bankruptcy court certifies that the case is ready for trial.

### **DISCUSSION**

The issue before the court arises from Thermo's assertion of a right to trial by jury in its answer and counterclaim. Thermo moves for withdrawal of reference of the case to permit its claims to be tried by jury in district court. As stated by the bankruptcy court, this court may withdraw referral of a case (in whole or in part) on its own motion or by timely motion by a party for "cause." 28 U.S.C. § 157(d). Bankruptcy courts do not have authority to conduct jury trials unless the parties consent, and as Thermo does not consent,<sup>2</sup> any jury trial in this case would have to be tried in this court. 28 U.S.C. § 157(e). The parties dispute whether Thermo has retained a right to jury under the circumstances.

There appears to be little dispute that the accounting claims sought in counts 9 and 10 are strictly equitable claims to which no right to trial by jury attaches.<sup>3</sup> However, Thermo's

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<sup>2</sup> The court notes that plaintiffs dispute whether Thermo has denied consent, raising equitable estoppel issues. The court will discuss these issues *infra* in the context of a potential waiver of Thermo's right to jury. The court finds *infra* that Thermo did not waive its right to jury by consenting to jurisdiction during the prior hearing. The court further finds that Thermo has not consented to a jury trial in the bankruptcy court for the same reasons for which equitable estoppel does not mandate waiver of Thermo's general right to jury.

<sup>3</sup> In *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 109 S.Ct. 2782 (1989), the Supreme Court found that to determine whether a party is entitled to a jury trial, the court must determine whether the claim sought is a legal or equitable one. *Id.* at 42 (citation omitted). "The United States Supreme Court has long recognized that, as a general rule, monetary relief is legal in

remaining claims seek monetary relief and are, therefore, legal in nature. The bankruptcy court found that Thermo has a right for these remaining claims to be tried by jury under the circumstances. Plaintiffs assert that Thermo consented to the jurisdiction of the bankruptcy court during a hearing held on March 22, 2007, and further assert that Thermo's filing of a counterclaim in the adversary case constitutes consent to the jurisdiction of the bankruptcy court.

Plaintiffs contend that, at a hearing on March 22, 2007, Thermo consented to the jurisdiction of the bankruptcy court, thereby consenting to trial of its adversary proceeding in the bankruptcy court. Plaintiffs contend that Thermo is equitably estopped from electing to litigate in a different forum. At the hearing, Thermo stated that "[w]e are happy to submit ourselves to the jurisdiction of this Court and if and when any adversary proceeding is filed, we won't argue about jurisdiction, we'll – it'll happen right here." However, after reviewing the statements and considering the context, the court agrees with the bankruptcy court that Thermo did not intentionally and knowingly consent to waive its right to a jury trial as to the adversary claims asserted here, which were filed eight months after the hearing. As stated by the bankruptcy court, any waiver of a Constitutional right must be clearer than the waiver evidenced by Trinsic's counsel's statements.

The court also finds that Thermo's filing of a counterclaim did not constitute consent to the adjudication of its claims by the bankruptcy court. When a party submits a proof of claim in a bankruptcy case, he voluntarily subjects himself to the bankruptcy court's equitable power and

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nature, and that claims for such relief give rise to a right to trial by jury. Control Center, L.L.C. v. Lauer, 288 B.R. 269, 278 (M.D. Fla. 2002) (citing Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 352 (1998)). Thus, as the bankruptcy court found, the accounting claims in counts 9 and 10 are strictly equitable claims which seek no monetary recovery and therefore have no right to jury trial attached.

is deemed to have waived his right to jury. See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 59, 41, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989). However, Thermo did not file a proof of claim in Trinsic's bankruptcy case, but filed an answer/counterclaim and third-party complaint in the adversary case within Trinsic's bankruptcy case. The claims asserted by Thermo are permissive under the Federal Rules of Bankruptcy but would be compulsory under the Federal Rules of Civil Procedure. See FED. R. CIV. P. 13 and FED. R. BANKR. P. 7013. The bankruptcy court noted that a majority of courts find that the filing of a counterclaim submits the party making the claim to the equitable jurisdiction of the bankruptcy court, thereby divesting the party of its right to a trial by jury. Some courts, however, conclude that a party does not waive its right to a jury trial or submit to the jurisdiction of the bankruptcy court simply by bringing a counterclaim that is permissive under the bankruptcy rules but that would have been compulsory under the Federal Rules of Civil Procedure. See e.g. Control Center, L.L.C. v. Lauer, 288 B.R. 269 (M.D. Fla. 2002); NDEP Corp. v. Handl-It, Inc. (In re NDEP Corp.), 203 B.R. 905 (D. Del. 1996); Beard v. Braunstein, 914 F.2d 434 (3d Cir. 1990). By statute, the bankruptcy rules "shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2075. Thus, the bankruptcy court found, and this court agrees, that the fact that the claims are permissive under the Federal Rules of Bankruptcy does not divest Thermo of its right to a jury trial.

The bankruptcy court found that these claims are legal claims (rather than equitable) that are compulsory under the Federal Rules of Civil Procedure and that do not trigger the claims allowance or disallowance process of the bankruptcy estate. Thermo's claims only request indemnity and/or reimbursement under the receivables agreement for any amounts it may be required to pay Trinsic. Thermo has not filed a proof of claim and its counterclaims raise no new

stand-alone claims against the estate. Upon a de novo review of Thermo's motion and the opposition to it, and a review of the proceedings in the bankruptcy matter, the court agrees with the analysis and conclusion of the bankruptcy court.

### **CONCLUSION**

For the reasons stated above, the court hereby **ADOPTS** Judge Mahoney's recommendation and **GRANTS** the motion to withdraw reference of this case as to all claims except the accounting claims in Counts 9 and 10, but delays the withdrawal until the bankruptcy court certifies that the case is ready for trial. Upon certification by the Bankruptcy Court that the parties are ready for trial, the court will withdraw the reference.

**DONE and ORDERED** this 18<sup>th</sup> day of March, 2008.

/s/ Callie V. S. Granade  
CHIEF UNITED STATES DISTRICT JUDGE